Supreme Court, U.S.
FILED
MAY 4 2001

(3)

No. 00-1379

IN THE

# Supreme Court of the United States

NGC SETTLEMENT TRUST AND THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,
*Petitioners,*

v.

NATIONAL GYPSUM COMPANY,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE LEGAL REPRESENTATIVE FOR UNKNOWN ASBESTOS DISEASE CLAIMANTS, THE BODILY INJURY TRUST ADVISORY COMMITTEE, AND THE CENTER FOR CLAIMS RESOLUTION IN SUPPORT OF THE PETITIONERS

MARK H. IOLA
STANLEY, MANDEL & IOLA, L.L.P.
3100 Monticello Avenue
Suite 750
Dallas, TX 75205
(214) 443-4300

Counsel for *amicus curiae*
Bodily Injury Trust
Advisory Committee

SANDER L. ESSERMAN
D.M. LYNN
(Counsel of Record)
STUTZMAN & BROMBERG
2323 Bryan Street
Dallas, TX 75201
(214) 969-4900

Counsel for *amicus curiae* Legal
Representative For Unknown
Asbestos Disease Claimants

May 4, 2001

2CPP

WILLIAM F. SHEEHAN
ROSS E. DAVIES
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 828-2000

Counsel for *amicus curiae*
Center For Claims Resolution

IN THE

# Supreme Court of the United States

No. 00-1379

NGC SETTLEMENT TRUST AND THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,

*Petitioners,*

v.

NATIONAL GYPSUM COMPANY,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE LEGAL REPRESENTATIVE FOR UNKNOWN ASBESTOS DISEASE CLAIMANTS, THE BODILY INJURY TRUST ADVISORY COMMITTEE, AND THE CENTER FOR CLAIMS RESOLUTION IN SUPPORT OF THE PETITIONERS

Having been unable to secure the respondent's consent, the proposed *amici curiae* hereby move under Supreme Court Rule 37.2(b) for leave to file the attached brief in support of the petition for a writ of certiorari herein.

This case involves the construction of a Bankruptcy Court order confirming the 1993 Plan of Reorganization of the debtor National Gypsum Company ("Old NGC"). The Legal Representative For Unknown Asbestos Disease Claimants ("Legal Representative") was appointed by the Bankruptcy

Court on April 13, 1992, and given "party in interest" status under the Bankruptcy Code to represent the interests of Unknown Asbestos Disease Claimants ("Unknown Claimants"), *i.e.*, individuals who did not hold legally cognizable asbestos personal injury claims against the debtor at the time the Plan of Reorganization was confirmed. Pet. App. 5a. The Bodily Injury Trust Advisory Committee ("the BI-TAC") was created by the Plan of Reorganization to consult and advise concerning the liquidation and resolution of asbestos disease claims in accordance with the terms and conditions of the Plan. The Center For Claims Resolution ("CCR") is a nonstock Delaware corporation established in 1988 to act as a claims handling facility for its member corporations named as defendants in asbestos personal injury suits.

The Plan of Reorganization divided the debtor's assets between two entities. Some of those assets, which are now essentially exhausted, went to the Asbestos Claims Management Corporation ("ACMC"), managed by the NGC Settlement Trust (collectively, "the Trust"), to be used to resolve claims brought by persons exposed to asbestos produced by Old NGC, including Unknown Claimants. The remaining assets, principally the operating assets, went to the National Gypsum Company ("New NGC"), which technically speaking was a newly formed company but in fact was created pursuant to the Plan and carried on the business of the debtor under the same management.

The Bankruptcy and District Courts construed the Confirmation Order and the Plan of Reorganization to mean that New NGC was liable to Unknown Claimants whose claims could not be satisfied by the Trust (and who proved injury caused by exposure to the debtor's products) to the same extent that Old NGC would have been liable. The Court of Appeals reversed, holding that the Bankruptcy Court intended that New

NGC would be liable only to Unknown Claimants who could also clear the much higher hurdle of state successor liability law.

The Legal Representative and the BI-TAC, representing the interests of actual or yet unknown plaintiffs who have claims that arise from exposure to the debtor's products but that cannot be satisfied by the Trust, have an obviously strong interest in removing the hurdle placed in the way of those plaintiffs' ability to be fully compensated for their injuries.

The CCR's members and ACMC (a former CCR member) are and will be named as defendants in literally hundreds of thousands of lawsuits brought by Unknown Claimants. Now that the Trust has exhausted its ability to satisfy valid claims against ACMC at full value, if the decision below stands, many Unknown Claimants will be precluded from looking to New NGC to make up ACMC's shortfall. Under applicable principles of joint and several liability, the CCR's other members may have to make up that shortfall. Moreover, the CCR's members have potential contribution claims against ACMC and New NGC, making them potential Unknown Claimants as defined by the Plan. Thus they are affected by the judgment below, which largely defeats the right of Unknown Claimants to sue New NGC.

The attached brief supplements rather than duplicates the petition. It shows (among other things) that, at the time of the reorganization, New NGC fully understood that the Bankruptcy Court intended that the Confirmation Order and Plan of Reorganization by themselves would impose potential liability on New NGC, quite apart from state successor liability laws. Hence the Fifth Circuit's acceptance of New NGC's revisionist history flouts the parties' understanding of the Plan of Reorganization and, if not reversed, will deprive over 400,000 claimants of their right to recover for injuries caused by exposure to the debtor's products.

For the foregoing reasons, the motion for leave to file the attached brief should be granted.

Respectfully submitted,

MARK H. IOLA
STANLEY, MANDEL
& IOLA, L.L.P.
3100 Monticello Avenue
Suite 750
Dallas, TX 75205
(214) 443-4300

Counsel for *amicus curiae*
Advisory Committee
Bodily Injury Trust

SANDER L. ESSERMAN
D.M. LYNN
(Counsel of Record)
STUTZMAN & BROMBERG
2323 Bryan Street
Dallas, TX 75201
(214) 969-4900

Counsel for *amicus curiae*
Legal Representative
For Unknown Asbestos
Disease Claimants

WILLIAM F. SHEEHAN
ROSS E. DAVIES
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 828-2000

Counsel for *amicus curiae*
Center For Claims Resolution

May 4, 2001

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTRODUCTION AND SUMMARY ..... 1

ARGUMENT ..... 3

I. NEW NGC ACKNOWLEDGED AND CONTESTED ITS LIABILITY FOR UNKNOWN CLAIMS AT CONFIRMATION ..... 3

II. THE COURT OF APPEALS WRONGLY DISCOUNTED THE VIEWS OF THE BANKRUPTCY COURT ..... 8

CONCLUSION ..... 11

## TABLE OF AUTHORITIES

**Cases** **Page**

*Commission of Dep't of Pub. Utils.* v. *New York, N.H. & H. R.R.*, 178 F.2d 559 (2d Cir. 1949) ..... 9

*Farmhand, Inc.* v. *Anel Eng'g Indus.*, 693 F.2d 1140 (5th Cir. 1982) ..... 8

*Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) ..... 5

*Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77 (1975) ..... 5

*In re BoNo Dev., Inc.*, 8 F.3d 720 (10th Cir. 1993) ..... 8

*In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 961 F.2d 1260 (7th Cir. 1992) ..... 8, 9

*In re Ranch House of Orange-Brevard, Inc.*, 773 F.2d 1166 (11th Cir. 1985) ..... 8

*In re Tomlin*, 105 F.3d 933 (4th Cir. 1997) ..... 8

*In re Weber*, 25 F.3d 413 (7th Cir. 1994) ..... 8, 9

*MacMillan Bloedel Ltd.* v. *Flintkote Co.*, 760 F.2d 580 (5th Cir. 1985) ..... 5

*Monarch Life Ins. Co.* v. *Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995) ..... 8

*Texas N.W. Ry.* v. *Atchison, Topeka & Santa Fe Ry.*, 860 F.2d 267 (7th Cir. 1988) ..... 8

*Truskoski* v. *ESPN, Inc.*, 60 F.3d 74 (2d Cir. 1995) ..... 9

*United States* v. *Rhynes*, 206 F.3d 349 (4th Cir. 1999) ..... 8

*United States* v. *Zolin*, 491 U.S. 554 (1989) ..... 5

**Statutes**

11 U.S.C. § 1141 ..... 3

11 U.S.C. § 1145(a)(1) ..... 6

**Other Authorities**

13 Timothy P. Bjar & James Solheim, Fletcher Cyclopedia of the Law of Private Corporations § 6043 (rev. vol. 1995) ..... 4

Restatement (Second) of Judgments § 59(2) (1982) ..... 4

Weinstein's Federal Evidence § 201.12[3] (2d ed. 2001) ..... 5

IN THE

# Supreme Court of the United States

No. 00-1379

NGC SETTLEMENT TRUST AND THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,

*Petitioners,*

v.

NATIONAL GYPSUM COMPANY,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF THE LEGAL REPRESENTATIVE FOR UNKNOWN ASBESTOS DISEASE CLAIMANTS, THE BODILY INJURY TRUST ADVISORY COMMITTEE, AND THE CENTER FOR CLAIMS RESOLUTION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

## INTRODUCTION AND SUMMARY[1]

This case involves the construction of a Bankruptcy Court order confirming the 1993 Plan of Reorganization for the debtor National Gypsum Company ("Old NGC"). The Plan divided the debtor's assets between two entities. The operating assets went to the National Gypsum Company ("New NGC"),

[1] No counsel for any party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission.

which was created by the Plan to carry on the business of the debtor, and did so under the same management. The remaining assets, now essentially exhausted, went to the Asbestos Claims Management Corporation ("ACMC"), which is managed by the NGC Settlement Trust (collectively, "the Trust"), to be used to resolve claims brought by persons exposed to asbestos produced by Old NGC. That included so-called Unknown Claimants – persons who at confirmation had not yet been (but would be) exposed to Old NGC products, or who had already been exposed but, because of the long latency period of asbestos injuries, were unaware of their illness.

As the Trust ran out of money, and struggled to determine how to allocate its dwindling resources in the face of over 400,000 pending and predicted claims against it, it sought a ruling from the Bankruptcy Court whether, under the terms of the Confirmation Order and Plan of Reorganization, New NGC would be liable to Unknown Claimants whose claims the Trust could not satisfy (and who proved injury caused by exposure to the debtor's products).

At confirmation the Bankruptcy Court had ruled that it could not provide notice consistent with due process to Unknown Claimants, had no jurisdiction over them, and could not discharge their claims. Pet. App. 8a, 65a-67a. Reviewing these rulings, the Bankruptcy Court held that it had intended that New NGC would be liable to Unknown Claimants whose claims the Trust could not satisfy to the same extent that Old NGC would have been liable. *Id.* 60a-81a. The District Court affirmed that decision. *Id.* 40a-59a. The Court of Appeals reversed in a 2 to 1 vote, holding that the Bankruptcy Court intended that New NGC would be liable only to Unknown Claimants who could also clear the much higher hurdle of state successor law. *Id.* 3a-39a.

*Amici* represent the interests of pending and future Unknown Claimants and co-defendants of ACMC in pending and future

suits.[2] We concur with and support the petitioners' contentions that certiorari should be granted to review and correct the Court of Appeals' violations of the Due Process rights of the Unknown Claimants and the limitations of Bankruptcy Code § 1141. The result reached by the Fifth Circuit is fundamentally unfair to the more than 400,000 Unknown Claimants whose ability to recover from New NGC in the event of the Trust's insolvency was carefully left unimpaired by the Bankruptcy Court but has now been jeopardized and possibly eliminated altogether.

Rather than repeat the arguments of petitioners, we make two additional points below. First we show that, contrary to the Fifth Circuit's understanding of "the terms of the deal" struck at confirmation (Pet. App. 34a), all the participants, and in particular New NGC, recognized that the Plan of Reorganization made New NGC liable once the Trust's funds were exhausted. Second, we show that the Court of Appeals gave insufficient consideration to the views of the very court whose intent it was purporting to discern.

## ARGUMENT

### I. New NGC Acknowledged And Contested Its Liability For Unknown Claims At Confirmation.

Overwhelming contemporaneous evidence in the public record shows that New NGC, as well as the Bankruptcy Court, the petitioners, and the Legal Representative, fully understood at the time of confirmation that, under the Confirmation Order and Plan of Reorganization, the resources of the Trust were all that stood between New NGC and liability for Unknown Claims.

---

[2] *Amici* are described more fully in their motion for leave to file this brief, *supra*.

The original draft of the proposed Plan would have forever barred Unknown Claimants from suing New NGC and thus completely relieved New NGC of liability. Pet. App. 6a. But the Bankruptcy Court held that it had no jurisdiction over those claimants because they did not hold "claims" as defined by the Bankruptcy Code. *Id.* 8a. Hence it imposed instead a "Channeling Order" requiring Unknown Claimants to look first to the Trust for compensation for their claims. *Id.* 9a. The Confirmation Order stated: "New NGC shall not be subject to the commencement or continuation of litigation by any person on or on account of Unknown Asbestos Disease Claims *pending exhaustion of the remedy or remedies provided by the [Trust]*." *Id.* 10a, 15a.[3]

The statutory Committee of Bond and Trade Creditors (the "BT Committee") represented creditors with claims against Old NGC. Their claims were converted under the Plan primarily into stock in New NGC. Thus those creditors were the prospective owners of one hundred percent of New NGC before, and became the actual owners upon, the effective date of the Plan (July 1, 1993). As shareholders they were the equivalent of and had the power to bind New NGC itself, just as shareholders are equivalent to and can bind the corporation in a shareholder derivative action.[4]

---

[3] The changes to the proposed Plan required by the Court's January 1993 ruling were effected by the Third Technical Modifications to the Plan. Pet. App. 9a.

[4] See, *e.g.*, Restatement (Second) of Judgments § 59(2) (1982) ("[T]he judgment in a derivative action by [a corporation's] stockholders or members is binding on the corporation."); 13 Timothy P. Bjur & James Solheim, Fletcher Cyclopedia of the Law of Private Corporations § 6043 (rev. vol. 1995) (both corporation and its shareholders are bound by a judgment in a derivative proceeding).

Those creditors, who may be presumed to have had the clearest eye to their own self-interest, understood perfectly that the Plan as confirmed imposed potential liability on New NGC. In fact they appealed the Confirmation Order to the District Court on that very ground – because "neither [it] nor the NGC Plan as confirmed discharges unknown asbestos claims or bars suits by [Unknown Claimants] against New NGC if the [Trust] can no longer pay such claimants in full."[5]

Similarly, they complained that the Bankruptcy Court had left New NGC "unprotected against the unknown claims" and that the Plan "subordinates the majority of the claims currently held by NGC's bond and trade creditors to an undetermined amount of asbestos-related liabilities."[6] They described New NGC as "a newly created *successor* corporation" and objected that the Plan "adversely impacts bond and trade creditors by imposing the entire risk of a future shortfall in Asbestos Trust assets onto bond and trade creditors, whose equity interests in New NGC are necessarily subordinated and subject to any future asbestos-related judgments against New NGC."[7]

---

[5] L. 6 at 7 (Brief of Appellant, [BT Committee], *National Gypsum Co. Statutory Comm. of Bond & Trade Creditors* v. *National Gypsum Co.* (N.D. Tex.), Apr. 21, 1993). Twelve copies of all documents with "L." cites have been lodged with the Office of the Clerk of the Court. This Court routinely takes notice of briefs filed in the lower courts, see, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 188 n.4 (2000); *United States* v. *Zolin*, 491 U.S. 554, 560 (1989); *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 81 & n.3 (1975), and so does the Fifth Circuit. See, *e.g.*, *MacMillan Bloedel Ltd.* v. *Flintkote Co.*, 760 F.2d 580, 587 (5th Cir. 1985). See also Weinstein's Federal Evidence § 201.12[3] (2d ed. 2001).

[6] L. 6 at 14, 15-16.

[7] L. 3 at 9, 24 (Omnibus Response of the [BT Committee] To First, Second and Third Motions of Appellees, National Gypsum Company and Aancor Holdings, Inc. to Dismiss Appeal, *National Gypsum Co. Statutory Comm. of Bond & Trade Creditors* v. *National Gypsum Co.*, No. 3:93-CV-126-H (N.D. Tex.), July 19, 1993) (emphasis added).

Moreover, the BT Committee told the District Court that "the pecuniary interests of [its] constituency will be directly and adversely affected" by the Plan, which subjects New NGC "to an enormous, undetermined amount of future asbestos liability" and "unfairly shift[s] to [them] the entire risk that the Asbestos Trust assets will not suffice to pay asbestos claims in full."[8] That refrain appeared throughout the Committee's filings.[9]

And there is still more: opposing a motion to continue the Bankruptcy Court's modification of the automatic stay, the BT Committee noted that, under the Plan, "new NGC essentially has its assets backing up the assets of the asbestos settlement fund," and that "asbestos creditors have a right to come after new NGC under the confirmed plan if their pot declines in value."[10]

In sum, New NGC fully recognized that, if the assets of the Trust turned out to be insufficient, the Plan and the Confirmation Order made it liable to Unknown Claimants as a successor to Old NGC within the meaning of the Bankruptcy Code (*e.g.*, § 1145(a)(1)). That is as clear a matter of record as anything could be.

---

[8] L. 4 at 10, 12 (Memorandum of Law in Support of Omnibus Response of the [BT Committee] To First, Second and Third Motions of Appellees, National Gypsum Company and Aancor Holdings, Inc. to Dismiss Appeal, *National Gypsum Co. Statutory Comm. of Bond & Trade Creditors* v. *National Gypsum Co.*, No. 3:93-CV-126-H (N.D. Tex.), July 19, 1993). See also *id.* at 11 (Plan subjects New NGC "to an unanticipated and significant amount of future asbestos liability").

[9] See also L. 2 at 2 (Reply Brief of Appellant [BT Committee], *National Gypsum Co. Statutory Comm. of Bond & Trade Creditors* v. *National Gypsum Co.*, No. 3:93-CV-126-H (N.D. Tex.), July 30, 1993) (the Plan subjected New NGC "to enormous future asbestos liabilities").

[10] See L. 5 at 35, 76 (Transcript of Proceedings, *In re National Gypsum*, No. 390-37213-SAF-11 (Bankr. N.D. Tex. Apr. 30, 1993)).

New NGC takes the position that it has no liability at all to Unknown Claimants under state successor liability law. Thus, it argued below that Texas successorship law governs all claims by Unknown Claimants, wherever brought, and bars them completely.[11] That gives the lie to its argument, which the Fifth Circuit astonishingly accepted, that it was merely stating mild concerns about "a more limited form of liability, state-law successor liability" (Pet. App. 24a), when it claimed in 1993 that the Order and Plan treated it as a "successor" (note 7, *supra*) with "its assets backing up the assets of the asbestos settlement fund" (note 10, *supra*), and subjected it "to enormous future asbestos liabilities." Note 9, *supra*.

In short, if New NGC had believed in 1993 that it was merely a successor subject to the almost impermeable protection afforded by Texas law, it would have had no reason whatsoever to object to the Confirmation Order and Plan.

Hence there is no escaping the fact that New NGC accurately perceived that the reorganization as confirmed in 1993 left it with "the entire risk that the Asbestos Trust assets will not suffice to pay asbestos claims in full." The Fifth Circuit accepted New NGC's revisionist history and overturned the rulings of the lower courts because it mistakenly believed an affirmance would "change the terms of the deal." Pet. App. 34a. In so doing the Fifth Circuit in fact vitiated the holding of the Bankruptcy Court that it had no jurisdiction to free New NGC from liability to Unknown Claimants.

---

[11] L. 1 at 31-32 (Appellant's Brief, *National Gypsum Co.* v. *NGC Settlement Trust and The Asbestos Claims Management Corporation*, No. 3:98CV1032-P (N.D. Tex.), May 13, 1998).

## II. The Court Of Appeals Wrongly Discounted The Views Of The Bankruptcy Court.

An appellate court should accord great deference to a lower court's interpretation of its own order, as the District Court correctly understood. See Pet. App. 51a.[12] Indeed, the Bankruptcy Court's intimate involvement with the complexities of developing and confirming the fairness of a reorganization plan is such that this deference extends not only to the Confirmation Order, but also to the Court's interpretation of the Plan of Reorganization itself.[13] Thus, a Bankruptcy Court's

---

[12] See also, *e.g.*, *Farmhand, Inc.* v. *Anel Eng'g Indus.*, 693 F.2d 1140, 1146 (5th Cir. 1982) ("'We see no basis for substituting our judgment for that of the district court in interpreting his own order.'") (citation omitted); *United States* v. *Rhynes*, 206 F.3d 349, 369 (4th Cir. 1999) ("[D]istrict courts are best able to interpret their own orders" and "are entitled to 'inherent deference' when they construe the same.") (citation omitted); *In re Tomlin*, 105 F.3d 933, 941 (4th Cir. 1997) ("[T]he bankruptcy court's interpretation of its own order * * * warrants 'customary appellate deference.'") (quoting *Texas N.W. Ry.* v. *Atchison, Topeka & Santa Fe Ry.*, 860 F.2d 267, 272 (7th Cir. 1988)); *In re BoNo Dev., Inc.*, 8 F.3d 720, 721-22 (10th Cir. 1993) ("The bankruptcy court surely knows more about the meaning of its own order than we do, and its interpretation of its order * * * is entitled to substantial deference."); *Monarch Life Ins. Co.* v. *Ropes & Gray*, 65 F.3d 973, 983 (1st Cir. 1995) ("[T]he bankruptcy court in this case was interpreting its own order of confirmation. We think customary appellate deference is appropriate in these circumstances * * *."); *In re Ranch House of Orange-Brevard, Inc.*, 773 F.2d 1166, 1168 (11th Cir. 1985) ("[W]e are reluctant to disturb a bankruptcy court's judgment interpreting its own earlier order. The bankruptcy judge who has presided over a case from its inception is in the best position to clarify any apparent inconsistencies in the court's rulings.").

[13] See, *e.g.*, *In re Weber*, 25 F.3d 413, 416 (7th Cir. 1994) ("In reviewing a bankruptcy court's interpretation of a confirmed plan, then, the reviewing court should extend to that interpretation the same deference that is otherwise paid to a court's interpretation of its own order."); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 961 F.2d 1260, 1264 (7th Cir. 1992) ("[W]hen a reorganization court interprets a confirmed plan of

interpretation must be upheld by a reviewing court so long as it is reasonable, and may be overturned only if it is an abuse of discretion.[14]

The Court of Appeals said that its "duty [was] to read the Plan documents to determine what is the best interpretation of the court's intent with respect to New-NGC's liability for Unknown Claims." Pet. App. 16a. It also said that it "should defer to the bankruptcy court's reasonable resolution of any ambiguities in" the Plan of Reorganization and the Confirmation Order (*id.* 14a), and that in fact "there is ambiguity in the documents." *Id.* 19a. Yet the majority ruled that the Bankruptcy Court's interpretation of the Plan and its own Confirmation Order was unreasonable, and that "the bankruptcy court never intended" that New NGC would be liable as was Old NGC (*id.* 22a),[15] even though that interpretation was offered by the very court that presided over the Plan and wrote the Order, and was accepted by the District Court and the dissenting Court of Appeals judge.

The Court of Appeals' insistence on disregarding the Bankruptcy Court's intent is highlighted by its treatment of the Confirmation Order's ban on the recovery by Unknown

---

reorganization, it interprets words on which it has already passed judgment. Under these circumstances, we believe that full deference to the court's decision is in order."); *Commission of Dep't of Pub. Utils.* v. *New York, N.H. & H. R.R.*, 178 F.2d 559, 563-64 (2d Cir. 1949) ("Any construction of a plan of reorganization by the district judge who is familiar with every phase of it is necessarily entitled to great weight.").

[14] See, *e.g.*, *Truskoski* v. *ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995) (a "court's interpretation of its order will not be disturbed 'absent a clear abuse of discretion'") (citation omitted); see also *In re Weber*, 25 F.3d at 417 (reasonableness standard); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d at 779-80 (abuse of discretion standard).

[15] See also Pet. App. 25a: "[T]he bankruptcy court wanted to impose [only] state-law successor liability on New NGC."

Claimants of punitive damages against New NGC. As the court noted (Pet. App. 25a-26a):

> [T]he Trust may be correct that the bankruptcy court's bar on punitive damages evinces an intent on the court's part to impose liability on New-NGC. That is, if the court intended to leave all questions of New-NGC's liability to state-law successor doctrine, it might seem odd that it would express any opinion on whether punitive damages could be recovered under state law.

The Court of Appeals went on, however, to rule "as a matter of law" that the Bankruptcy Court had no jurisdiction to bar punitive damages (*id.* 26a) and on that basis to "reject the argument that the punitive-damages bar has *any bearing* on New-NGC's liability for Unknown Claims." *Id.* 27a (emphasis added). The flaw in that reasoning is that, even if the Bankruptcy Court lacked jurisdiction to bar punitive damages, the fact that it did so is nonetheless highly relevant to its intent, and would have been taken into account by a reviewing court truly interested in discerning that intent (as it was by the District Court, see *id.* 54a).

This case is unusual in that three of the five judges to have considered the meaning of the Plan and Confirmation Order agree that it left New NGC with the same liability to Unknown Claimants as Old NGC. The majority would have reached the same conclusion had it fairly considered the objections of New NGC's owners at confirmation, and accorded the Bankruptcy Court's interpretation of its own rulings the deference it deserved.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK H. IOLA
STANLEY, MANDEL
& IOLA, L.L.P.
3100 Monticello Avenue
Suite 750
Dallas, TX 75205
(214) 443-4300

Counsel for *amicus curiae*
Advisory Committee
Bodily Injury Trust

SANDER L. ESSERMAN
D.M. LYNN
(Counsel of Record)
STUTZMAN & BROMBERG
2323 Bryan Street
Dallas, TX 75201
(214) 969-4900

Counsel for *amicus curiae*
Legal Representative
For Unknown Asbestos
Disease Claimants

WILLIAM F. SHEEHAN
ROSS E. DAVIES
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 828-2000

Counsel for *amicus curiae*
Center For Claims Resolution

May 4, 2001